Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors

A

B

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–605 OF 2007
CHEW SOO HO JC
31 JANUARY 2012

C

Civil Procedure — Pleadings — Facts not pleaded — Fraud — Whether sufficient particulars of fraud pleaded — Failure of defendant to apply to strike out plaintiff's claim or to request for further and better particular — Whether defendant estopped from contending insufficiency of particulars pleaded

D

Companies and Corporations — Directors — Breach of fiduciary duties — Directors declaring dividend payments from monies which were not profits — Directors carrying on business with intent to defraud creditors — Whether director may plead ignorance over actions of co-directors — Whether abating duty as director by blindly following instructions of co-directors

E

Companies and Corporations — Directors — Fraud on creditors — Whether director carrying on business with intent to defraud creditors — Dividend payments declared from monies which were not profits — Directors aware of arbitration judgment debts owed by company — Whether with intent to defraud creditors proven — Standard of proof required — Companies Act 1965 s 304(1)

F

Companies and Corporations — Directors — Personal liability — Whether business of company carried on with intent to defraud creditors — Dividend payments declared from monies which were not profits — Directors aware of arbitration judgment debts owed by company — Directors carrying on business with intent to defraud creditors — Whether director may plead ignorance over actions of co-directors — Companies Act 1965 s 304(1)

G

H

Companies and Corporations — Dividend — Profits available for dividend — Dividend payments declared from monies which were not profits — Whether director carrying on business with intent to defraud creditors — Companies Act 1965 s 365(1)

I

Companies and Corporations — Shareholders — Liability — Shareholder receiving dividends declared from monies which were not profits — Whether shareholder liable as constructive trustee for dividends received

Companies and Corporations — Winding up — Liquidators — Locus standi — Whether liquidators could institute suit against directors for carrying on of business with intent to defraud creditors — Companies Act 1965 s 304(1)

This suit only proceeded against the first, third and 13th defendants ('the defendants'). The first and third defendants were directors of Par-Advance Sdn Bhd ('the company') while the 13th defendants was a shareholders in the Ccompany. The plaintiffs' claim was premised on s 304(1) of the Companies Act 1965 ('Act) for the recovery of debts and liabilities of the company alleging that first and third defendants as directors had carried on the business of the company with the intent to defraud the creditors of the company which referred basically to Kemas Construction Sdn Bhd ('Kemas') which was the principal contractor for the company, by means of two declarations of dividend payments when they knew fully well that those were not the profits of the company. Kemas had carried out some construction works for the company and had obtained judgment on an arbitration award against the company in the High Court for the sum of RM4,942,454.16. Kemas had also obtained judgment against the company in the High Court for RM1,595,875.67. The company was wound upon Kemas' petition for winding up. The two declarations of dividend payments were RM2.5m on 25 April 2001 and RM1.8m on 2 May 2001 respectively. As against the first and third defendants, the plaintiffs alleged that the two defendants by passing the directors' resolutions dated 25 April 2001 and 2 May 2001 respectively to pay the said dividends, had wilfully paid or permitted to be paid dividends to shareholders out of what they knew were not profits of the company thereby in breach of s 365 of the Act. As against the 13th defendant, the plaintiffs alleged that the 13th defendants had received the two dividend payments fully well knowing that the same were effected unlawfully. Hence the plaintiffs contended that the 13th defendants was liable as constructive trustees for all the payments of dividends received. The first defendant denied his liability and averred that he was not involved in the decisions to declare the two dividend payments nor was he personally involved in the management of the business of the company; he merely signed the said resolutions on the instruction of the third defendant. The 13th defendants contended, inter alia, that the dividend payments were made to the shareholders out of the profits of the company after the provisions had been made for contingent liabilities in respect of Kemas' claims against the company and denied the plaintiffs' claim. The defendants also claimed that the plaintiffs could not institute the present suit and that the plaintiffs had failed to plead particulars of fraud.

Held, allowing the claim against the first, third and 13th defendants with costs:

(1) The company ought not have paid out the dividends knowing very well that by such payments of the dividends, there would not have been sufficient fund left to meet the award which may render or risk the company insolvent. However, dividends were paid out ignoring the said

Award as well as the fact that there was also a High Court suit against the company. There was no evidence that the company had any other projects which might generate profits to cater for or to meet the two huge claims of Kemas. The intent of declaring the two dividends and their subsequent payment of the dividends leaving the company with meagre fund on paper disregarding the award and making no attempt to review payments was amply clear that even if Kemas should ultimately succeed in both its claims against the company be it on appeal or not the company would have no fund to pay those liabilities (see para 19).

(2) There was no necessity for the company to pay out the RM4.3m dividends in six payments, each preceded by deposits of sums near equivalent to each sum paid out indicating the insufficiency of funds in the company's account. With such payment of dividends, there was virtually no monies to pay creditor. The plaintiffs had proved on a balance of probabilities the ingredient 'with intent to defraud creditors' under s 304(1) of the Act *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569 referred; *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185 referred (see para 19).

(3) In normal circumstances where fraud is alleged in civil proceedings, it has to be proved beyond reasonable doubt; however, by the term 'if it appears' as used in s 304(1) of the Act, it indicates that a lower degree of proof is required. The standard of proof in cases under s 304(1) of the Act is thus one of a balance of probabilities *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 referred; *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569 referred (see para 19).

(4) Section 365(1) of the Act provides that no dividend shall be payable to the shareholder of any company except out of profits. Profits payable must be a true and fair profit of the company which the directors of the company have the duty to ensure the true and fair view not only of the profits but also the losses. Profits available for dividend must therefore be profits after having made provision for past losses, for reserves or for other purposes (see paras 20–21).

(5) The first and third defendants as directors had acted to the prejudice of the creditors and infringed s 365(1)–(2)(b) of the Act by willfully paying out or permitting to pay out the two dividends in the existence of the said arbitration award and they had thereby failed to take into account the interests of creditors of the company. The reasonable inference to be drawn from such act of the first and third defendants was that the company's business was carried on by them with intent to defraud creditors (see para 24).

(6) There was no reason why the plaintiffs as liquidators of the company could not institute this suit against the defendants especially so when

s 304(1) of the Act categorically allows the liquidators to do so vide the phrase 'on the application of the liquidator' (see para 32).

(7) The plaintiffs' pleadings had pleaded sufficient particulars and facts of the plaintiffs' allegation of the first and third defendant's intent and act to defraud the creditors of the company. In any event, if any particulars were lacking, the defendants should have applied to strike out the plaintiffs' claim or requested or applied for further and better particulars which the defendants had failed to do and hence they must be estopped from contending that the particulars in the statement of claim were insufficient *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 referred (see para 34).

(8) It is unacceptable for a director to plead innocence and ignorance when he has an overriding duty to act bona fide for the benefit of the company particularly in the disposition of the company's monies which is one of the most important aspect of the company's management. The first defendant blindly followed the instruction of the third defendants by abating his duty to the company as a director without even exercising his independent discretion as such could not be relieved of his liability under s 365(2)(b) of the Act (see para 43).

[Bahasa Malaysia summary

Guaman ini hanya dimulakan terhadap defendan-defendan pertama, ketiga dan ke-13 ('defendan-defendan tersebut'). Defendan-defendan pertama dan ketiga merupakan pengarah-pengarah Par-Advance Sdn Bhd ('syarikat tersebut') manakala defendan ke-13 merupakan pemegang saham dalam syarikat tersebut. Tuntutan plaintif-plaintif adalah berasaskan s 304(1) Akta Syarikat 1965 ('Akta tersebut') untuk mendapat balik hutang dan liabiliti syarikat tersebut dengan mendakwa bahawa defendan-defendan pertama dan ketiga sebagai pengarah-pengarah yang telah menjalankan perniagaan syarikat tersebut dengan niat untuk menipu pemiutang-pemiutang syarikat tersebut yang dirujuk pada amnya kepada Kemas Construction Sdn Bhd ('Kemas') yang merupakan kontraktor utama syarikat tersebut, melalui dua deklarasi untuk bayaran dividen walhal mereka mengetahui bahawa bayaran tersebut bukan keuntungan syaraikat tersebut. Kemas telah menjalankan kerja-kerja pembinaan untuk syarikat tersebut dan telah mendapat penghakiman ke atas award timbang tara terhadap syarikat tersebut di Mahkamah Tinggi untuk sejumlah RM4,942,454.16. Kemas juga telah mendapat penghakiman terhadap syarikat tersebut di Mahkamah Tinggi untuk sejumlah RM1,595,875.67. Syarikat tersebut telah digulung berdasarkan petisyen Kemas untuk penggulungan. Dua deklarasi untuk bayaran dividen tersebut berjumlah berjumlah RM2.5 juta pada 25 April 2001 dan RM1.8 juta pada 2 Mei 2001 masing-masingnya. Terhadap defendan-defendan pertama dan ketiga, plaintif-plaintif mendakwa bahawa kedua-dua defendan tersebut dengan meluluskan resolusi pengarah-pengarah bertarikh 25 April 2001 dan

2 Mei 2001 masing-masingnya untuk membayar dividen-dividen tersebut, telah membayar dengan niat atau membenarkan dibayar dividen-dividen tersebut kepada pemegang-pemegang saham daripada apa yang diketahui mereka bukan keuntungan syarikat tersebut dan dengan itu telah melanggar s 365 Akta tersebut. Terhadap defendan ke-13, plaintif-plaintif mendakwa bahawa defendan-defendan ke-13 telah menerima dua bayaran dividen dengan mengetahui sepenuhnya bahawa ia telah diperoleh dengan menyalahi undang-undang. Justeru itu plaintif-paintif berhujah bahawa defendan ke-13 adalah bertanggungjawab sebagai pemegang amanah konstruktif untuk semua bayaran dividen yang diterima. Defendan pertama menafikan liabitinya dan menegaskan bahawa dia tidak terlibat dalam keputusan untuk mengisytiharkan dua bayaran dividen tersebut mahupun yang dia terlibat secara peribadi dalam pengurusan perniagaan syarikat tersebut; dia hanya menandatangani resolusi-resolusi tersebut atas arahan defendan ketiga. Defendan ke-13 berhujah, antara lain, bahawa bayaran-bayaran dividen telah dibuat kepada pemegang-pemegang saham daripada keuntungan syrikat tersebut selepas peruntukan-peruntukan telah dibuat untuk liabiliti-liabiliti luar jangka berkaitan tuntutan Kemas terhadap syarikat tersebut dan menafikan tuntutan plaintif-plaintif. Defendan-defendan juga mendakwa bahawa plaintif-plaintif mendakwa bahawa plaintif-plaintif tidak boleh memulakan guaman ini dan bahawa plaintif-plaintif telah gagal memplid butiran untuk fraud.

Diputuskan, membenarkan tuntutan terhadap defendan-defendan pertama, ketiga dan ke-13 dengan kos:

(1) Syarikat tersebut tidak patut membayar dividen-dividen tersebut dengan mengetahui bahawa dengan membuat bayaran dividen-dividen tersebut, maka dana kewangan tidak akan mencukupi untuk memberi award itu yang mungkin mengakibatkan atau membawa risiko syarikat tersebut menjadi tidak solven. Walau bagaimanapun, dividen-dividen tersebut telah dibayar tanpa menghiraukan award tersebut dan fakta bahawa terdapat juga guaman Mahkamah Tinggi terhadap syarikat tersebut. Tiada keterangan bahawa syarikat tersebut mempunyai apa-apa projek lain yang boleh menjana keuntungan bagi menampung atau memenuhi dua tuntutan besar Kemas tersebut. Niat mengisytiharkan dua dividen tersebut dan bayaran dividen selanjutnya oleh mereka telah meninggalkan syarikat tersebut dengan dana kewangan yang sedikit atas kertas tanpa menghiraukan award tersebut dan tidak ada usaha untuk melihat semula bayaran tersebut jelas menuntukkan bahawa jikapun Kemas berjaya dalam kedua-dua tuntutannya terhadap syarikat tersebut di peringkat rayuan atau tidak syarikat tersebut masih tiada kewangan untuk membayar liabiliti-liabiliti tersebut (lihat perenggan 19).

(2) Tiada keperluan untuk syarikat tersebut membayar dividen sejumlah RM4.3 juta dalam enam bayaran, setiap satu didahului dengan jumlah

deposit yang hampir sama dengan setiap jumlah yang dibayar menunjukkan ketidakmampuan kewangan dalam akaun syarikat tersebut. Dengan bayaran dividen sedemikian, maka tiada wang untuk membayar pemiutang. Plaintif-plaintif telah membuktikan atas imbangan kebarangkalian elemen niat untuk melakukan fraud ke atas pemiutang di bawah s 304(1) Akta tersebut *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569 dan *LMW Electronics Re Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185 dirujuk (lihat perenggan 19).

(3) Dalam keadaan biasa di mana fraud dikatakan wujud dalam prosiding sivil, ia perlu dibuktikan melampaui keraguan munasabah; bagaimanapun, melalui terma 'if it appears' sebagaimana digunakan dalam s 304(1) Akta tersebut, ia menunjukkan bahawa tahap pembuktian yang kurang diperlukan. Piawai pembuktian dalam kes-kes di bawah s 304(1) Akta tersebut dengan itu adalah melalui imbangan kebarangkalian *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 dan *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569 dirujuk (lihat perenggan 19).

(4) Seksyen 365(1) Akta tersebut memperuntukkan bahawa tiada dividen patut dibayar kepada pemegang saham daripada mana-mana syarikat kecuali daripada keuntungannya. Keuntungan yang perlu dibayar hendaklah merupakan keuntungan sebenar dan adil syarikat tersebut yang mana pengarah-pengarah syarikat tersebut mempunyai kewajipan untuk memastikan pendapat yang sebenar dan adil bukan hanya berhubung keuntungan tetapi juga kerugian. Keuntungan yang terdapat dengan itu hendaklah merupakan keuntungan selepas membuat peruntukan untuk kerugian lampau, untuk rizab atau bagi tujuan lain (lihat perenggan 20–21).

(5) Defendan-defendan pertama dan ketiga sebagai pengarah-pengarah telah bertindak secara prejudis terhadap pemiutang dan melanggar s 365(1)–(2)(b) Akta tersebut dengan sengaja membayar atau membenarkan dibayar kedua-dua dividen tersebut yang wujud dalam award timbang tara dan mereka dengan itu telah gagal mengambil kira kepentingan pemiutang-pemiutang syarikat tersebut. Inferens munasabah yang boleh dibuat daripada perbuatan defendan-defendan pertama dan ketiga menunjukkan bahawa perniagaan syarikat tersebut telah dijalankan oleh mereka dengan niat untuk melakukan fraud ke atas pemiutang-pemiutang tersebut (lihat perenggan 24).

(6) Tiada sebab kenapa plaintif-plaintif sebagai penyelesai syarikat tersebut tidak boleh memulakan guaman ini terhadap defendan-defendan terutamanya apabila s 304(1) Akta tersebut secara nyata membenarkan penyelesai-penyelesai berbuat demikian melalui frasa 'on application of the liquidator' (lihat perenggan 32).

(7) Pliding plaintif-plaintif telah memplid butiran dan fakta mencukupi berhubung pengataan plaintif-plaintif tentang niat defendan-defendan pertama dan ketiga dan perbuatan melakukan fraud terhadap syarikat tersebut. Dalam apa keadaan, jika apa-apa butiran tidak mencukupi, defendan-defendan hendaklah memohon pembatalan tuntutan plaintif-plaintif atau memohon atau meminta butir-butir selanjutnya yang mana defendan-defendan telah gagal berbuat demikian dan justeru itu mereka diestopkan daripada berhujah bahawa butiran dalam penyataan tuntutan adalah tidak mencukupi *Lai Yoke Ngan & Anor v Chin Teck Kwee* [1997] 2 MLJ 565 dirujuk (lihat perenggan 34).

(8) Adalah suatu yang tidak boleh diterima apabila pengerah mengaku tidak bersalah dan tiada pengetahuan apabila dia mempunyai kewajipan sebenar untuk bersikap dengan niat baik demi faedah syarikat tersebut khususnya dalam keadaan di mana wang syarikat merupakan salah satu aspek penting dalam pengurusan syarikat. Defendan pertama dengan membuta tuli telah mengikut arahan defendan ketiga dengan tidak melakukan kewajipannya terhadap syarikat tersebut tanpa melaksanakan budi bicaranya dengan itu tidak boleh terlepas daripada liabiliti di bawah s 365(2)(b) Akta tersebut (lihat perenggan 43).]

Notes

For a case on fraud on creditors, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 291.

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 195–208.

For cases on facts not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6017–6025.

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2011 reissue) paras 1368–1420.

For cases on personal liability, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 334–346.

Cases referred to

Belmont Finance Corp v Williams Furniture Ltd and Others (No 2) [1980] 1 All ER 393, CA (refd)

Blackwell v Moray & Anor (1991) 5 ACSR 255, SC (refd)

Hume Industries (Far East) Ltd; Hume Industries (FE) Ltd, Re v Humes Ltd [1974] 1 MLJ 167 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

LMW Electronics Re Ltd v Ang Chuang Juay & Ors [2010] 1 MLJ 185; [2010] 4 CLJ 849, HC (refd)

Marra Development Ltd v BW Rofe Pty Ltd (1977–1978) 3 ACLR 185, CA (refd)

Pharmmalaysia Bhd v Dinesh Kumar Jashbai Nagjibha Patel & Ors [2004] 7 CLJ 465, HC (refd)
Potel v Inland Revenue Commissioners [1971] 2 All ER 504, Ch D (refd)
Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569; [2003] 4 CLJ 68, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Walker v Wimborne (1975) 137 CLR 17, HC (refd)
William C Leitch Bros Ltd, Re [1932] 2 Ch 71, Ch D (refd)
Winkworth v Edward Baron Development Co Ltd [1987] 1 All ER 114, HL (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Companies Act 1961 [AU] s 376(1)
Companies Act 1965 ss 169(6)(m)(ii), (n), (o), (p), (q), 169(7), 218, 304(1), 365, 365(1), (2)(b), Form 32A
Evidence Act 1950 s 118
Rules of the High Court 1980 O 18 r 12(1)

Conrad Young (Sreenevasan Young) for the plaintiff.
Fazleeza Azli (Shearn Delamore & Co) for the defendant.

Chew Soo Ho JC:

THE PARTIES

[1] When this suit was filed on 9 October 2007, the liquidator at the material time was Datuk Tan Kim Leong. By an Order of the High Court dated 7 September 2010 vide Companies Winding Up No MT4–28–122 of 2004, both the plaintiffs were substituted as liquidator in place of Datuk Tan Kim Leong, the initial liquidator appointed for Par-Advance Sdn Bhd.

[2] The first to ninth defendants were the directors of Par-Advance while the third to seventh defendants and tenth to 13th defendants were the shareholders at all material time. However, as at 25 April 2001 and 2 May 2001, it was agreed that the directors of the company comprised only the first and third defendants. This is the admitted or agreed fact as shown in bundle J tendered to court.

[3] On 1 December 2011 ie the second day of the trial, the plaintiffs withdrew the claim against the second and fifth to 12th defendants with the consent of each party bearing their own costs and upon that withdrawal, the

claim against the second and fifth to 12th defendants were accordingly struck out with no liberty to refile and with an order that the costs will be borne by respective parties. The fourth defendants had passed away, his case was withdrawn and struck out accordingly. This suit is consequently proceeded against the first, third and 13th defendants only ('the defendants' unless otherwise named).

FACTUAL MATRIX OF THE CASE

[4] The plaintiffs' claim is premised on s 304(1) of the Companies Act 1965 for the recovery of debts and liabilities of Par-Advance Sdn Bhd ('the company') alleging that the first and third defendants as directors had carried on the business of the company with the intent to defraud the creditors of the company which referred basically to Kemas Construction Sdn Bhd ('Kemas') which was the principal contractor for the company, by means of three declarations of dividend payments when they knew fully well that those were not the profits of the company. However, amidst trial, the plaintiff withdrew that part of their claim pertaining to the first dividend payment of RM9m, on 1 December 2011 and the case was thus proceeded against the defendants in respect of the remaining two declarations of dividend payments of RM2.5m on 25 April 2001 and RM1.8m on 2 May 2001 respectively.

[5] As against the first and third defendants who were the directors of the company at the material time, the plaintiffs alleged that the two defendants by passing the directors' resolutions dated 25 April 2001 and 2 May 2001 respectively to pay the said dividends, had wilfully paid or permitted to be paid dividends to shareholders out of what they knew were not profits of the company thereby in breach of s 365 of the Companies Act 1965.

[6] As against the third and 13th defendant, the plaintiffs alleged that both defendants had received the second and third dividend payments when they knew fully well that the same were effected unlawfully and hence the plaintiffs contended that the third and 13th defendants were liable as constructive trustees for all the payments of dividends received.

[7] The first defendant denied his liability and averred that he was not involved in the decisions to declare the two dividend payments nor was he personally involved in the management of the business of the company; he merely signed the said resolutions on the instruction of the third defendant. Personally, the first defendant had not received any of the dividends as he was not a shareholder.

[8] The third and 13th defendants contended, inter alia, that the dividend payments were made to the shareholders out of the profits of the company after

A the provisions had been made for contingent liabilities in respect of Kemas' claims against the company and denied the plaintiffs' claim.

THE ISSUES

B **[9]** The issues as agreed by the parties to be tried are contained in bundle Q. With the withdrawal by the plaintiffs of the claim in respect of the first dividend payment of RM9m, the issues remained for trial are as follows:

(a) whether the first and third defendants as directors of the company, in passing the directors' circular resolutions of 25 April 2001 and 2 May 2001 respectively and in paying or permitting to be paid to shareholders these second and third dividend payments amounting to RM2.5m and RM1.8m respectively, had done so wilfully knowing that what they paid or permitted to be paid were not profits of the company and/ or had carried on the business of the company with the intent to defraud the creditors of the company thereby liable under s 365(2)(b) and / or s 304(1) of the Companies Act 1965;

(b) whether the third and 13th defendants as shareholders of the company and recipients of the second and third dividend payments well knew that such payments to them were effected in the circumstances as stated above in breach of s 304(1) and s 365(2)(b) of the Companies Act 1965 and consequently had knowingly received the said payments and are accountable as constructive trustees of the same; and

(c) whether the plaintiffs are entitled to the relief they seek against the defendants.

EVALUATION AND FINDINGS

[10] The three issues above are indeed closely knitted that they are to be considered together. Since the plaintiffs' claim against the defendants is grounded primarily on s 304(1) and s 365(2)(b) of the Companies Act 1965 (Act 125) ('the Act') I shall reproduce these two provisions for ease of reference. Section 304(1) of the Act provides:

> 304(1) if in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the Company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[11] Section 365(2)(b) of the Act states:

> 365(1) No dividend shall be payable to the shareholders of any company except out of profits or pursuant to section 60.
>
> (2) Every director or manager of a company who wilfully pays or permits to be paid any dividend out of what he knows is not profits except pursuant to section 60 —
>
> (a) …
>
> (b) shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and that amount may be recovered by the creditors or the liquidator suing on behalf of the creditors.

[12] Reading the above two provisions together, the plaintiffs suing as liquidators of the company must prove that the business the company had been carried on with intent to defraud its creditors or for fraudulent purpose and that the director of the company who wilfully pays or permits to be paid the dividends out of what he knows is not profits, is liable to the creditors of the dividends so paid that have exceeded the profits.

[13] The undisputed facts among the parties herein are that Kemas had contracted with the company to carry out works for the company in the construction and completion of shop-offices, car park podium and hawker centre on Lot 885, Mukim 15, Seberang Prai Tengah, Penang ('the said project'). Arising from the said project, on 10 September 1998 Kemas sued the company in the High Court for the sum of RM1,595,875.67, interest and costs being non-payment by the company for work done by Kemas. Kemas also instituted an arbitration proceeding against the company on or about 1 October 1998 to recover the balance due to them in the sum of RM5,349,397.21 as revised with interest and costs for work done and this arbitration proceedings culminated with an award published by the arbitrator on 26 May 2001 in the sum of RM4,301,360.46 in favour of Kemas (bundle C pp 16–73). On 25 May 2004, Kemas obtained judgment on the arbitration award against the company in the High Court at Kuala Lumpur for the sum of RM4,942,454.16 with interest at the rate of 8%pa from 17 June 2001–25 May 2004 and further interest at 8%pa from 25 May 2004 until full settlement and costs ('the first judgment'). On 12 July 2004, Kemas obtained judgment against the company in the Penang High Court for the sum of RM1,595,875.67 together with 8%pa interest and costs ('the second judgment'). It is thus agreed among the parties that Kemas was and is at all material times a creditor of the company within Part X of the Companies Act 1965 when the company was wound up vide Penang High Court order made on 9 November 2005 (bundle C pp 8–88) upon Kemas' petition for winding up under s 218 of the Companies Act 1965 on ground of the company's

inability to pay its debts. The total of the two judgment sums with interest is RM7,735,095.59 as at 16 August 2004 when Kemas petitioned for winding up of the company.

[14] Substantially, the facts of this case are not disputed by the parties. The crux of the dispute is primarily whether the declarations of dividend payment vide the directors' resolutions dated 25 April 2001 and 2 May 2001 were made out of the profits of the company or otherwise.

[15] The plaintiff submitted that despite the large amounts due and owing by the company to Kemas, the company declared and paid out large sums of money as dividend. It was submitted that by referring to the company's account for the year ended 31 December 1999 (bundle C pp 168–190) and the evidence of the third defendants ('DW1'), the 'Revenue' in the figure of RM31,859,271, the 'profit after taxation' and the 'retained profits' of RM13,542,790 (bundle C p 178) are all tainted by artificial boosting from the sales of the company's units of constructed shop-offices to its own shareholders for RM10,277,000. The shareholders did not make any payment for those purchases but they were contra from the dividends. In addition apart from the company's shareholders, DW1 confirmed that four other purchasers of the company's shop-offices were companies in which he was a director and shareholder particularly a company called Right Properties Sdn Bhd which had bought eight units of the shop-offices wherein for four units, a rental income guarantee' was created by the company in favour of Right Properties Sdn Bhd ie with guaranteed rental yield of 10%pa for five years amounting to RM1,203,930 upon which Right Properties Sdn Bhd was allowed to withhold the sum of RM1,150,000 of the purchase price for the five years as security for the guaranteed rental and the debt of Right Properties Sdn Bhd amounting to RM1,074,000 was booked in as an 'asset' in the form of 'receivable' of the company which goes to boost the 'retained profits' and 'net current assets' positions of the company. DW1 (the third defendant) also confirmed that all the sales and purchase agreements and the 'rental income guarantee' agreements were signed by the first defendant on behalf of the company while DW1 himself signed on behalf of Right Properties Sdn Bhd. Hence, the plaintiffs submitted that the defendants had perpetrated a scheme commencing from the 1999 account and as admitted by the DW1 (the third defendant) as well as DW2, the accountant who signed off the account, everything flows from the RM31,859,271 of 1999 'Revenue'; the 'retained profits' of RM13,542,790 also flows from this RM31.8m in the 'Revenue'. DW2 has also agreed that if this 'retained profits' figure is wrong, meaning that if it is far less a sum than it ought truly to be, that would affect the propriety of the dividends declared. It is undisputed that it was based on this 'retained profits' of RM13.5m that the first dividend of RM9m was declared and paid to the shareholders. Referring to the company's statement of changes in equity for

financial year ended 31 December 2001 (bundle C p 224), the plaintiffs submitted that if the 'Revenue' for 1999 in the sum of RM31,859,271 were to deduct off the sums of RM10,277,000 being the purported purchases by shareholders, and RM1,074,000 being the alleged debt owing by Right Properties Sdn Bhd for the alleged purchases, the 'Revenue' would drop to RM20,508,271 so will the 'Profit' which will drop to RM245,510 and the 'retained profits' which will drop to RM2,191,700. This in effect will in no way permit the company to declare any of the first, second and third dividend.

[16] More pertinently, in respect of the second and third dividend which are relevant herein this trial, the plaintiff referred to the same statement at bundle C p 224 and contended that even if the 1999 accounts figures for 'Revenue', 'profit' and 'retained profits' were correct, there is still no basis for the second and third dividend to have been declared and paid out. As at 31 December 2000, only the sum of RM4,340,522 of 'retained profits' was brought forward to 1 January 2001 and the 'profit after taxation' for the financial year ended 31 December 2001 was RM7,266. The second dividend was declared by a resolution dated 25 April 2001 (bundle C pp 285–288) and third dividend by a resolution dated 2 May 2001 (bundle C pp 289–292) with the total dividends of RM4.3m. Payments of the RM4.3m was only made between 13 November 2001 and 31 December 2001 in six payments of varying amounts (payment cheques at bundle C pp 377–382). Between the resolutions declaring the second and third dividend on 25 April 2001 and 2 May 2001 and the dates of payment of the second and third dividend which were in November and December 2001, the aribitrator had on 26 May 2001 published his award in favour of kemas against the company for the sum of RM4,301,360.46 which sum was admitted by DW 1 (the third defendant); the arbitration award is at bundle C pp 17–63 particularly at p 62. This sum of award, according to DW2, the auditor and accountant of the company, had crystalised a liability upon the company to pay Kemas the said sum and hence the amount of RM4,301,360.46 would have to be provided for in full in the company's account for the financial year ended 31 December 2001. If the said arbitration award was provided for in full, then it is submitted by the plaintiffs that the 'retained profits' brought forward from 31 December 2000–1 January 2001 would not have been the sum of RM4,340,522 as in the 2001 accounts in bundle C p 224 but would have shown a 'retained loss' of RM1,360.46. On this point of provision for the arbitration award, DW 2 in his evidence was attempting to say that the company had provided for the principal sum of the claim referring to note 15 in the 2001 accounts (bundle C p 232) which reads:

> 15 Contingent Liability
>
> A creditor has filed against the Company to recover principal debts amounting to approximately RM 3,048,982 plus interests and costs. The principal debts has been provided in the financial statements of the Company but no provision has been made for interest and cost pending outcome and settlement of the legal proceeding.

[17] However, in cross-examination, DW2 changed to say:

> Basically this is a disclosure rather than provision. We disclose in the accounts that there is a case for RM 3 million. This is only a disclosure.

[18] DW2 stated they were also aware of the aforesaid award. Although DW1 (the third defendant) maintained that the disclosure of RM3.048m in contingent liability is the correct figure instead of RM4.3m as per the award, he had endorsed indirectly that note 15 above is a disclosure and not a provision. Indirectly speaking if note 15 is a disclosure, there is no provision made and if provision has been made as it seems to appear in note 15, there is no provision for the full amount of the award of RM4.34m but only the sum of RM3.048m as stated in note 15.

[19] In so far as what has been submitted on the facts and evidence particularly the accounts of the company as recapitulated about, I find that all these facts are substantially clear and I do not think that they can be disputed except for the contention by the defence that the declaration and payment of dividends were from the profits of the company as per the statement of accounts for the financial year ended 31 December 2000 and 31 December 2001. However, from the facts and evidence adduced as a whole, it appears to me that a scheme had been structured in such a manner that the money of the company could be paid out as dividends as if there were profits contrary to its true position and hence the accounts could not be the correct statement in relation to the profits of the company at the material time. I am inclined to accept the version of the plaintiff to be correct and true. The second dividend of RM2.5m was declared on 25 April 2001 (bundle C pp 285–288) and the third dividend of RM1.8m was declared seven days later on 2 May 2001 (bundle C pp 289–292). At the material time of these two dividends being declared, the company and in particular the third defendants who appeared to be the director managing the affairs of the company with all other directors having resigned except first defendant, knew that Kemas had instituted legal proceedings both in the High Court and the arbitration to recover outstanding sums for the work done by them against the company. Both aforesaid proceedings were instituted in 1998. The third defendants (DW1) had admitted in evidence that he knew of the arbitration award of RM4.3m but disclosure was made in respect of the principal sum of RM3.048m meaning that no provision was made for the said award although it was subject to the appeal process by the company. When the arbitration award was published on 26 May 2001 soon after the directors' resolutions declaring the two dividends were passed of about a month on 25. April 2001 and 2 May 2001, no payment of the said dividends were paid out until November and December 2001 of seven or eight months later by which time the award of the arbitrator had been known to have existed. The company ought not have paid out the dividends

knowing very well that by such payments of the dividends, there would not have been sufficient fund left to meet the award which may render or risk the company insolvent. However, dividends were paid out ignoring the said award as well as the fact that there was also a High Court suit against the company of RM1,595,875.67 excluding interest and costs. More pertinently, there is no evidence that the company had any other projects which might generate profits to cater for or to meet the two huge claims of Kemas. The second and third dividend were in fact declared as interim dividends. Hence, before payment is made, the board of directors could have reviewed its decision having known of the said award and resolved not to pay the dividends or at least it could have reconsidered, acting bona fide, as to whether it ought to be paid at all; see *Potel v Inland Revenue Commissioners* [1971] 2 All ER 504 cited by learned counsel for the plaintiffs. No attempt at all had been made by the first and third defendants as the directors of the company to reconsider the question of the said dividends payments when they had full knowledge of the said award published on 26 May 2001 before making the payments in November and December 2001. The intent of declaring the two dividends and their subsequent payment of the dividends leaving the company with meagre fund on paper disregarding the award and making no attempt to review payments is amply clear that even if Kemas should ultimately succeed in both its claims against the company be it on appeal or not the company would have no fund to pay those liabilities. I am inclined to agree with the plaintiffs' submission that there would be no necessity for the company to pay out the RM4.3m dividends in six payments, each preceded by deposits of sums near equivalent to each sum paid out indicating the insufficiency of funds in the company's account. With such payment of dividends, there is virtually no monies to pay creditor. In the circumstances, I find that the plaintiffs have proved on a balance of probabilities the ingredient 'with intent to defraud creditors' under s 304(1) of the Companies Act 1965; see the cited cases of *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569; [2003] 4 CLJ 68 (CA); *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185; [2010] 4 CLJ 849. In normal circumstances where fraud is alleged in civil proceedings, it has to be proved beyond reasonable doubt (*Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)); however, by the term 'if it appears' as used in s 304 (1) of the Companies Act 1965, it indicates that a lower degree of proof is required (per His Lordship Abdul Hamid Mohamed JCA (as he then was) in *Siow Yoon Keong*'s case. The standard of proof in cases under s 304(1) of the Companies Act 1965 is thus one of a balance of probabilities.

[20] Section 365(1) of the Companies Act 1965 provides that no dividend shall be payable to the shareholder of any company except out of profits. In considering the provision of s 376(1) of the Companies Act 1961 (NSW) which is in pari materia with s 365 (1) of the Companies Act 1965, the New South Wales Court of Appeal in the case of *Marra Development Ltd v BW Rofe*

Pty Ltd (1977–1978) 3 ACLR 185 as cited by learned counsel for the plaintiffs, gave the meaning of the term 'payable … out of profits' (at p 189) as follows:

> It was contended that the word 'payable out of profits' could not be understood literally, in that the profits of a company were not a segregated fund from which something was physically extracted for the purpose of distribution. I find no difficulty in giving a literal meaning to the words. Profits of a company for the purpose of a final dividend can only be understood against the accounts which have to be laid before the company. … These accounts have to disclose profits and losses, and the directors of the company have the duty to ensure that the profit and loss account give 'a true and fair view of the profit or loss of the compan'. When s 376 (1) provides that no dividend shall be payable except out of profits, what it means in relations to a final dividend is that the laying before the company of a profit and loss account and balance sheet which truly and fairly discloses a profit out of which dividend may be paid is a pre-condition of the shareholders acquiring any right to a dividend … per Hutley JA.

[21] In brief, profits payable must be a true and fair profit of the company which the directors of the company have the duty to ensure the true and fair view not only of the profits but also the losses. In another cited case of *Re Hume Industries (Far East) Ltd; Hume Industries (FE) Ltd v Humes Ltd* [1974] 1 MLJ 167, Tan Ah Tah J accepted the passage which gives the meaning of the phrase 'profits available for dividend cited from *Palmer's Company Law* as a correct statement of the law at p 169 as follows:

> As to the precise meaning of the phrase 'profits available for dividend', there is a passage in *Palmer's Company Laws* (21st Ed), p 662 which reads as follows:
>
> > 'Profits available for dividend' has been held to mean the profits which the directors consider should be distributed after making provision for past losses, for reserves or for other purposes.

[22] Profits available for dividend must therefore be profits after having made provision for past losses, for reserves or for other purposes. The plaintiffs submitted that the 'retained profits' of the year ended 31 December 2000 which was brought forward to the year 2001 as RM4,340,522 was a falsity. At best, it was contended that the 'retained profits' was overstated by RM1,252,378.46 being the difference between the arbitration award of RM4,301,360.46 and the 'provision' or disclosure vide note 15 in the financial statement for the year 2001 of RM3,048,982. Referring to the evidence of DW2, the auditor who signed off the company's accounts, who said that although the award was issued on 26 May 2001 before the payment of the second and third dividend which were made in November and December 2001, the declarations of dividends could not be reversed but the dividends ought not then to be paid out even though declared, the plaintiffs submitted that the payment of the second and third dividend after the award of 26 May

2001 which had eroded the 'retained profits', was wrong and unlawful. I must agree that if the first and third defendants as directors of the company, had been bona fide in the conduct of the business of the company and having known of such award which imposed a liability of RM4.3m on the company, ought to have made provision for such purpose and to refrain from making payment of the second and third dividend if they were honest of the financial status of the company. Both the first and third defendants as directors and alter ego of the company must know of the award after the declaration of the second and third dividend and before payment. This fact of the existence of such arbitration proceeding with a claim against the company of RM3,048,982 excluding interest was disclosed in the 2001 account vide note 15. The first and third defendants could not deny knowledge of same but must know that taking into account the provision of RM3,048,982 as disclosed, there could not have been sufficient profits out of which dividends could be declared and paid out. The first and third defendants were the two directors who signed the two resolutions which declared the second and third dividend (bundle C pp 286–288 and pp 289–292) and the six payments cheques (bundle C pp 377–382) of the dividends while third defendants was the sole recipient of the six payment cheques in the total sum of RM4.3m. I find that they knew what they were doing and did what they intended to do. In *Walker v Wimborne* (1975) 137 CLR 17 (High Court of Australia), Mason J said:

> It should be emphasised that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them. The creditors of a company … must look to that company for payment. His interests may be prejudiced by the movement of funds between companies in the event that the companies become insolvent.

[23] In *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114, at p 118 (HL), Lord Templeman said:

> A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.

[24] Following the aforesaid authorities and on a balance of probabilities, I find that the first and third defendants as directors have acted to the prejudice of the creditors and infringed s 365(1)–(2)(b) of the Companies Act 1965 by willfully paying out or permitting to pay out the second and third dividend in the existence of the said arbitration award and they have thereby failed to take into account the interests of creditors of the company of the amount due by the company to the creditors. By paying out RM4.3m dividends from the alleged

RM4,340,522 'retained profits' and RM7,266 'profit after taxation' in 2001, leaving behind a meagre sum of RM47,788 (C p 224) as profits, I find no reasonable prospect of the creditors ever receiving payment of the debt as in the award because the company monies which could probably be used to pay the creditors were paid out to third defendants as dividends in the sum of RM4.3m. The reasonable inference to be drawn from such act of the first and third defendants is that the company business was carried on by them with intent to defraud creditors. It is apt herein and suffices to cite what had been held by Maugham J in *Re William C Leitch Bros Ltd* [1932] 2 Ch 71 as quoted by His Lordship Abdul Hamid Mohamad JCA (later CJ) in *Siow Yoon Keong v H Rosen Engineering BV* on what the phrase 'with intent to defraud creditors … or for any fraudulent purpose' connotes as follows:

> In *Re William C Leitch Bros Ltd* [1932] 2 Ch 71 Maugham J held at p 77 that 'if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intend to defraud'.

[25] The third defendants as the shareholder of the company held 30% of its total shares with the remaining 70% being owned by the 13th defendants since 7 April 2001. Nevertheless, it was admitted by the third defendants (DW1) vide his witness statement that the 13th μdefendants is in fact his nominee. By that admission, it is a vivid fact that third defendants is indeed the 100% shareholder of the company effective from 7 April 2001. The third defendants had purchased the 70% shares under the name of the 13th defendants for RM1.72m vide Forms 32A in bundle C pp 294–00. He was one of the two directors who passed the company resolutions declaring the two dividends; he was one of the two signatories to the cheques (bundle C pp 377–382) paying the dividends of RM4.3m to himself and he had received such payments. These are admitted evidence by the third defendant. The plaintiffs submitted that the third defendants knew fully well that there was no basis for the declaration and payment of the second and third dividend and hence he as the shareholder and recipient of the RM4.3m will be liable as a constructive trustee to disgorge the monies he received from the second and third dividend payments citing in support the case of *Pharmmalaysia Bhd v Dinesh Kumar Jashbai Nagjibha Patel & Ors* [2004] 7 CLJ 465 where His Lordship Abdul Malik Ishak J (as he then was) adopted the principle of law laid down by Buckley LJ in *Belmont Finance Corp v Williams Furniture Ltd and Others (No 2)* [1980] 1 All ER 393 (CA) that if 'the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds'.

[26] The third defendants is one of the directors. The monies paid as the dividends are undoubtedly monies of the company which the third defendants and the other director are entrusted to apply, manage or utilise in accordance with their fiduciary duty. To reiterate, the directors of the company ie the third defendants and the first defendant, have paid out the said dividends ignoring the interests of the creditors which the third defendants in particular had known fully well that such payments were not the true profits of the company but with intent to defraud the creditors. The third defendants who received the monies as the sole shareholder indirectly is a constructive trustee of the monies received by him. The third defendants is thus liable to the company as such 'sole' shareholder in the company.

[27] The first and 13th defendants did not testify in court. The first defendant was present throughout the trial while the 13th defendants did not attend court at all. The first defendant indicated and submitted that he relied entirely on the evidence and submission of the third defendants who said in his witness statement (D4) that he was also giving evidence on behalf of the first and 13th defendant.

[28] In the third defendant's defence allegedly also on behalf of the first and 13th defendant, numerous points or contentions were raised. I shall deal with them accordingly to determine whether the defence has rebutted the case of the plaintiffs on a balance of probabilities.

[29] The first challenge raised in submission is on the capacity of PW1 who is a Director — Advisory of BDO Consulting Sdn Bhd while both the plaintiffs are also from the same company, that he is not qualified and could not testify in place of the liquidators who should personally testify. It must be emphasised that both the liquidators PW2 (Mok Chew Yin) and PW3 (Datuk Tan Kim Leong) who were the liquidators of the company between 7 September 2010 to date and 9 November 2005–7 September 2010 respectively, had testified to the effect that PW1 was given the full authority to represent them and to give evidence on their behalf. I do not find merit in the defence's contention that PW1 is not qualified to testify for the plaintiffs in such circumstances. In addition, PW1 was involved directly in assisting PW3 since December 2007 and subsequently the plaintiffs in the carrying out of their duties and functions as liquidators of the company and has full access to all documents of the company in the possession of the liquidators. I find PW1 to be a witness of facts as he gave evidence as to what he had done and what he had found in the course of performing his task. As a witness of facts he could certainly testify to facts of his personal knowledge as well as facts from all relevant documents of the company which he had access in the discharge of his duties. Evidence thus far shows that PW1 was doing the ground work including investigation into the matter pertaining to this case together with

other team members but he did not make the decision; the final decision was vested in the liquidators. There was no delegation to him of discretion requiring the liquidators' professional judgment: *Palmer's Company Law* para 15.325. I hold that PW1 is a competent witness pursuant to s 118 of the Evidence Act 1950 and is qualified to testify as such.

[30] The main thrust of the defence is the flaw in the pleadings in that this action is taken on behalf of Kemas but there was no disclosure in the plaintiffs' pleadings of the 14 units of shop-offices which were the security provided by the company to them as per the order of the High Court dated 6 December 2001 and that with the 14 units as security, Kemas' claim had been sufficiently provided by the company. The relevant High Court order in relation to this provision of security is at bundle C pp 76–78. Having read this order in its proper context in relation to the 14 units of shop-offices, I find it unequivocal that these 14 units were to be held by the company and not to be dealt with by the company without the prior written consent of Kemas as a condition for the encl 1 therein to be heard and this undertaking by the company was in lieu of payment into court. It is thus abundantly clear that these 14 units were not a security to Kemas for which Kemas could enforce by foreclosure to recover its debt from the company. Hence, Kemas is in no way a secured creditor.

[31] The 14 units remained with the company but as per the order, the company could not deal with them without the prior written consent of Kemas until the disposal of the suit therein. In the circumstances, I agree with the plaintiffs' submission that there is no necessity to plead this fact as they are not material facts in the plaintiffs' claim. In any event, the undisputed amount of RM6,548,319.06 that remains owing to the creditors of the company is a sum arrived at having taken into account the sale of the 14 units by the liquidators in the course of the winding up of the company and this fact has been specifically pleaded in the plaintiffs' reply to the defence of the third and 13th defendant. Since the 14 units are not the security to Kemas, the third and 13th defendant's submission as to why Kemas did not take action to sell them at the appropriate time and the rest of the contentions would fall as the domino effect. I filed no necessity to deliberate further.

[32] Learned counsel for the third and 13th defendants had been asserting that this suit was filed on behalf of Kemas. It may well be factually as Kemas is a 99.98% creditor of the company. However, legally, this is not so as the liquidators pursue this case under ss 304(1) and 365(2)(b) of the Companies Act 1965 which state that the action is for and on behalf of all creditors of the company. I do not find that the duties and functions of the liquidators under ss 304(1) and 365(2)(b) can be eroded merely because of the number of creditors or who the substantial creditors are. Irrespective of the number of creditors of the company or who they are, so long as the liquidators can prove the

infringement of the provisions of the aforesaid sections of the Companies Act 1965, they have the legal right to institute action to recover what is rightfully the monies or property of the company. The liquidators have all the accounts and all the documents of the company. They are certainly in a better position as compared to a creditor who may not have access to all relevant documents of the company, to investigate into any impropriety, irregularity or unlawful act with intent to defraud the creditors. I see no reason why the plaintiffs as liquidators of the company herein this suit could not institute this suit against the defendants especially so when s 304(1) of the Companies Act 1965 categorically allows the liquidators to do so vide the phrase 'on the application of the liquidator'. This contention that this action was filed on behalf of Kemas by the defence is eminently unsustainable.

[33] The other technical challenge by the defence is on the pleadings that the plaintiffs have failed to plead particulars of fraud, particulars of the amount of debt due by the company to Kemas to the extent by which the dividends of RM4.3m so paid had exceeded the profits and particulars of the ultimate sum claimable.

[34] On the requirement to plead particulars of fraud, since s 304(1) of the Companies Act uses the words 'with intent to defraud creditors of the Company', I agree when fraud is alleged, material particulars must be pleaded in line with the requirements of O 18 r 12(1) of the Rules of the High Court 1980. This is irrespective whether the standard of proof under s 304(1) of the Companies Act 1965 is lower than the standard of proof for fraud in normal cases which is beyond reasonable doubt. Looking at the plaintiffs' pleadings vide paras 17 and 19 of the statement of claim which learned counsel for the plaintiffs have summarised and paraphrased them in para 44 of the submission in reply, I find that the aforesaid two paras 17 and 19 of the statement of claim have indeed pleaded sufficient particulars and facts of the plaintiffs' allegation of the first and third defendant's intent and act to defraud the creditors of the company. I find palatable in the plaintiffs' submission that if any particulars are lacking, the third and 13th defendants should have applied to strike out the plaintiffs' claim or requested or applied for further and better particulars which defendants had failed to do and hence they must be estopped from contending that the particulars in the statement of claim are insufficient. Both the third and 13th defendants had indeed applied to strike out the plaintiffs' claim on ground, inter alia, of the non-disclosure of the 14 units of shop-offices vide the High Court order dated 6 December 2001 but not on ground of the lack of particulars of fraud. By not doing so, it is reasonable to infer that the defendants had thereby led the plaintiffs to believe that defendants had been satisfied with the facts in the other parts of the pleadings. In all probabilities, the defendants should be estopped from later changing course to contend

A insufficient particulars in the pleadings. Estoppel arises in such circumstances; see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC).

[35] On the failure to plead particulars of the amount of debt due by the company to Kemas. I am in agreement with the plaintiffs' submission that this B action is not an action by or for Kemas but a claim by the plaintiffs as liquidators pursuant to s 365(2)(b) which is not a claim for special damages. The plaintiffs nevertheless have pleaded vide para 18(b) in the statement of claim that 'the 1st and 3rd Defendant as directors of the Company are pursuant to section 365(2)(b) of the Companies Act 1965 liable to the creditors of the C Company to the extent of RM4,300,000.00' and have so prayed for the same in para 23 prayers (e)–(f) therein. I find no necessity for other facts to be pleaded which are not material to the claim. As to the particulars of ultimate sum claimable, the third and 13th defendants submitted that the statement of claim does not disclose the amount ultimately due to Kemas from Par-Advance D and for which the defendants are liable if at all, in declaring and effecting the dividend payments in the aggregate sum of RM4.3m for the financial year ended 2001. I find it amply clear that the plaintiffs are claiming RM4.3m being the second and third dividend declared and paid out disregarding the interests of the creditors of the company when a debt had been published vide the E arbitration award. Whether the plaintiffs did or did not plead the sale of the 14 units of shop-offices will not affect the duties and functions of the plaintiffs as liquidators as they are duty bound to recover what is due to the company and/or wrongfully and unlawfully removed from the company and to pay the creditors; for whatever surplus after paying the creditors, it will be paid to the F shareholders. Hence it does not affect the plaintiffs' claim whether the detail account which is in fact a matter of evidence is pleaded or otherwise. I do not find in whatever way the defendants will be taken by surprise or are being prejudiced as the claim against both of them is unambiguous ie RM4.3m being the second and third dividend declared and paid out which the plaintiffs G contended to be wrongful/unlawful. The plaintiffs have in submission postulated an alternative to the RM4.3m claim on the assumption that if this court is to accept the note 15 in the 2001 accounts to be a provision for the amount of RM3,048,982 as disclosed then, as compared to the award of RM4,301,360.46, there is still an under provisions in the sum of H RM1,252,378.46. Thus, the retained profits for 2001 of RM4,340,522 is over-stated by RM 1,252,378.46, which should be in the figure of RM3,088,143.54. If this correct sum of RM3,088,143.54 of retained profit is calculated against the second and third dividends of RM4.3m, a sum of RM1,211,856.46 would have been paid out of what was not profits of the I company. I find this to be consistent with s 365(2)(b) of the Companies Act 1965 as to the liability of the directors of the company that they shall be liable to the creditors of the company for the amount of the debts to the extent by which the dividends so paid have exceeded the profits. I shall determine which of the two figures ie RM4.3m as originally claimed or the alternative claim of

RM1,211,856.46 which is much lesser should be the appropriate sum pursuant to the provisions of s 304(1) and s 365(2)(b) of the Companies Act 1965. In the final analysis, I must disagree with the defence's contention of an abuse of the process in not disclosing the ultimate sum claimable from the dividends payments of RM4.3m. I find no necessity to deal with the defence's submission of 'special damages' which I find to be irrelevant as the claim by the plaintiffs is premised, to reiterate, on ss 304(1) and 365(2)(b) for the dividends wrongfully and unlawfully paid out or permitted to be paid out from the company. There is no question of damages being claimed in the strict sense but a recovery of the monies clothed as dividends that were wrongfully and/or unlawfully paid out.

[36] Defence also submitted that the only requirement on disclosure under the Companies Act 1965 is set out in s 169(6)(m)(ii), (n) and (o) of the Companies Act 1965 which provides that each report on the profit or loss of the company shall state any contingent liability which has arisen since the end of the financial year ended stating the maximum amount or an estimate of the maximum amount for which the company could become liable; secondly whether any contingent or other liability has become enforceable or likely to become enforceable within the period of 12 months after the end of the financial year which in the opinion of the directors, will or may affect the liability of the company to meet its obligations when they fall due and giving particulars thereof; and thirdly whether at the date of the reports the directors are aware of any circumstances not otherwise dealt with in the report or accounts which would render any amount stated in the accounts misleading and giving particulars of the circumstances. Defence contended that the plaintiffs' witness PW1 did not say that the reports and financial statements for the years ended 31 December 200 and 31 December 2001 are inadequate or misleading or do not represent the true state of affairs of the company.

[37] It must be noted that s 169(6)(m), (n) and (o) must not be read in isolation or disjunctively; they must indeed be read together with sub-s (6)(p)–(q) as it is clear from the conjunction 'and' at the end of sub-s (6)(p) and before the last sub-s (6)(q). Section 169(6)(p)–(q) provided that whether the results of the company's operations during the financial year were, in the opinion of the directors, substantially affected by any item, transaction or event of a material and unusual nature and if so, giving particulars thereof, if known or reasonably ascertainable; and whether there has arisen in the interval between the end of the financial year and the date report any item, transaction or event of a material and unusual nature likely, in the opinion of the directors, to affect substantially the results of the company's operation for the financial year of the report and if so, giving particulars of them. Section 169(7) of the Companies Act 1965 defines the expression 'any item, transaction or event of a material and unusual nature' to include, inter alia, any absence from the

accounts or consolidated accounts of any material item usually included in the accounts or consolidated accounts. It is a fact in this case that the 1999 and 2000 accounts of the company did not disclose or make provision for Kemas' claims in the region of RM8m then that Kemas had instituted legal action since 1998. DW2, the company's auditor, stated that he was not informed of this; otherwise, a disclosure or provision would have been made in the said Aaccounts. In the 2001 report and financial statement, only a claim by a creditor for the principal sum of RM3,048,982 was disclosed when the award was for RM4,301,360.46. PW1 and DW 2 said that full provision had to be made by the company of the award published on 26 May 2001. This is because the liability had crystalised by 26 May 2001 in relation to the award against the company. Reading s 169(m)–(q) in totality, I find that the first and third defendants had not complied with the provisions by their failure to disclose the actual liability of the company that had crystalised and which would certainly affect the accounts and financial status of the company. If the exact sum as in the award of RM4,301,360.46 is disclosed and taken into consideration, the 'retained profits' in particular as shown in the 2001 financial statement (C — p 224) in the total of RM4,347,788 (RM4,340,522 + RM7,266) would undoubtedly be misleading and untrue.

[38] Defence had also submitted that the withdrawal of the plaintiffs' claim for RM9m (first dividend) being dividends declared and paid out for financial year ended 2000 would indicate that there is no impropriety in the dividend in the sum of RM4.3m as the reports and financial statements for the years ended 31 December 2000 and 31 December 2001 are identical in all material respects in terms of the dividends declared. The plaintiffs conversely submitted that there is a major difference between the first dividend declared on 3 January 2000 and settled by contra with the purported purchase of the shop-offices by the shareholders at the same time and the second and third dividend declared on 25 April 2001 and 2 May 2001 but paid in November–December 2001. It is a fact that when the second and third dividend were paid out in November–December 2001, the arbitration award had already been published since 26 May 2001 adjudging the company with a liability of RM4,301,360.46 in favour of Kemas. This is the basis of the plaintiffs' claim which is not in any way affected by the withdrawal of their claim for RM9m.

[39] The general law relating to payment of dividends out of the company's profits is undoubted. However, in the circumstances of this case, a liability had been adjudged which if taken into account by the first and third defendants as the directors, would render the company without any or with substantially insufficient 'retained profits' to pay out any dividends. There is virtually no or insignificant profits to declare dividends. The fact and evidence are clear

enough in the instant case that the defendants cannot be allowed to base on the incorrect or untrue account to declare and pay out company's money as dividends.

[40] The third and 13th defendants in their final straw submitted on the doctrine of estoppel on the basis of the 14 units of shop-offices being security for Kemas which I have dealt with. The 14 units were not security to Kemas as per the High Court order dated 6 December 2001 and Kemas was not a secured creditor of the company vide that same order. I find no merit in such contention and must hold that no estoppel could arise.

[41] Reverting to the position of the first defendant who was present in court but declined to testify and instead relied on the evidence of the third defendants who allegedly testified on first defendant's behalf, plaintiffs submitted the case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 where the Federal Court laid down two consequences for such failure or refrain from giving evidence ie the evidence given by the appellant ought to have been presumed to be true and secondly, an adverse inference ought to be drawn against the first respondent who refrained from testifying. The first defendant in his submission, apart from adopting the third and 13th defendant's submission in total, asserted, in addition, that the first defendant was not involved in the decisions to declare the dividends of RM4.3m and that teh first defendant was never personally involved in the management of the business of the company nor was he personally involved in any of the said board resolutions referring to the third defendant's/DW1's witness statement ('D4'). Evidence of third defendants also showed that the first defendant had signed the resolutions on the third defendant's instructions. It was further submitted that first defendant was not a shareholder of the company and had not received any of the said dividends payments. On a final point, the first defendant submitted that there is no reason for the first defendant to declare the dividend with an intention to defraud Kemas or any other creditors of the company. The plaintiffs submitted on the contrary that the first defendant by knowingly assisting the third defendants in the passing of the resolutions to declare the second and third dividend and the subsequent signing of the six payment cheques in favour of dividend payments to the third defendants must be placed in the same position as 'a party to the dishonesty of the trustees' citing *Pharmmalaysia*'s case where His Lordship Abdul Malik Ishak J (as he then was) has quoted the speech of Buckley LJ in *Belmont Finance* as follows:

> As I understand Lord Selborne LC's second head, a stranger to a trust notwithstanding that he may not have received any of the trust fund which has been misapplied will be treated as accountable as a constructive trustee if he has

knowingly participated in a dishonest design on the part of the trustees to misapply the fund; he must himself have been in some way a party to the dishonesty of the trustees.

[42] The first defendant is not a stranger but a director/trustee of the company. As a director, he owed a duty to the company to ensure that the company funds were properly managed. By signing the resolutions to declare dividends and by signing the payment cheques to pay out dividends, his signatures were irrefragable evidence of his assent to the declarations of dividends and the payment of the dividends from the company's funds. Thus, he must be taken to have been knowingly assisting the third defendants in the removing of the company's monies in the form of dividend payments with the intent to defraud the creditors of the company when there was in existence an award of RM4.3m which if taken into account, would clearly render the company without any sufficient 'Retained Profits' to declare and pay any dividends at all. In *Blackwell v Moray & Anor* (1991) 5 ACSR 255 (Supreme Court of New South Wales), Cohen J said as follows:

> … A mere general sense of honesty of purpose is not in my view sufficient to satisfy the requirements that a director acted bona fide for the benefit of a company. It requires at least a consideration of views or of relevant material in order that he may act in a bona fide way. The abandonment of any proper consideration of relevant facts, the admitted failure to exercise an independent discretion and the mere doing of what was thought that the majority shareholder wanted cannot in these circumstances have amounted to the bona fide exercise of the discretion required of a director …

[43] It is unacceptable for a director to plead innocence and ignorance when he has an overriding duty to act bona fide for the benefit of the company particularly in the disposition of the company's monies which is one of the most important aspect of the company's management. The first defendant in blindly following the instruction of the third defendants by abating his duty to the company as a director without even exercising his independent discretion as such cannot be relieved of his liability under s 365(2)(b) of the Companies Act 1965. By merely following the instruction of third defendants blindly, it certainly does not amount to the bona fide exercise of the discretion required of a director. He had indeed failed to perform his duty as a director when he failed to exercise any discretion vested in him. What has been submitted vide the first defendant's written submission especially as to whether he had the intention to defraud the creditors, his knowledge of the financial status of the company, the decision to declare dividend payments etc which he himself ought to know very well, should have been given as evidence from his own month but he refrained from giving such evidence. The adverse inference as envisaged in *Takako Sakao*'s case is thus to be drawn against the first defendant that had he testified, his evidence would not be favourable to him in that he would not be able to

rebut his failure as a director of the company to act bona fide in the interest of the company. I hold, on a balance of probabilities that the first defendant is liable as the third defendants under ss 304(1) and 365(2)(b) of the Companies Act 1965 as director of the company who paid out or permitted to pay out dividends with the intent to defraud the creditors of the company when the company would not have the 'retained profits' to pay such dividends.

CONCLUSION

[44] For the foregoing reasons and upon consideration of all the facts and evidence in this case and all the submission by all parties herein this trial, I hold that the plaintiffs have proved their case against the first, third and 13th defendants on a balance of probabilities and that all the three defendants have failed to rebut the plaintiffs' case on a balance of probabilities.

[45] Upon the plaintiffs' withdrawal of the action against all other defendants except first, third and 13th defendants and the abandonment of the claim in respect of the first dividend of RM9m, prayers (c), (d), (g), (h), (i), (j), (k), (l), (m) and (n) in para 23 of the statement of claim become irrelevant and ought to be deleted or struck out. As for the remaining prayers, I make the following order.

[46] As stated earlier, the plaintiffs' initial claim after the withdrawal of the first dividend remains for the sum of RM4.3m being the second and third dividend payments. In submission, the plaintiffs have submitted on an alternative claim taking into consideration the disclosure vide note 15 in the 2001 report and financial statement of the company of the sum of RM3,048,982 that the sum of RM1,211,856.46 would be the extent by which the dividends so paid have exceeded the profits of the company (see the calculation as stated above). In line with s 365(2)(b) of the Companies Act 1965, I am prepared to give the benefit of the doubt to the first and third defendants upon their disclosure in the 2001 report and financial statement of the claim by the creditor (Kemas) and find this sum of RM1,211,856.46 arrived at having taken into account the sum disclosed to be the appropriate sum as it is arrived at from the documentary evidence before this court. Consequently, I allow the plaintiffs' claim for a declaration pursuant to ss 304(1) and 365(2)(b) of the Companies Act 1965 that the first and third defendants as directors of the company are personally responsible and liable to the creditors of the company in the sum of RM1,211,856.46 and I order the first and third defendants to jointly and/or severally pay the plaintiffs, as liquidators of the company and on behalf of the creditors of the company, the said sum of RM1,211,856.46 with interest at the rate of 4% from the date of filing this action till the date of judgment and at the rate 4% from the date of judgment till the date of realisation. The unchallenged fact that 13th

defendants is a nominee of the third defendants and the undisputed fact shown that the 13th defendants had not received any of the RM4.3m of dividends payments but it was the third defendants who had received all the payments vide the six payment cheques issued in his name personally, I therefore make no order against the 13th defendants in respect of prayer (o).

[47] Lastly I order cost against the first defendant in the sum of RM10,000 and against the third defendants and 13th defendants in the sum of RM25,000 to be borne by the third defendant.

Claim against first, third and 13th defendants allowed with costs.

Reported by Kanesh sundrum